



STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY COMMISSION

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July 10, 2007

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Advisory Op. No. 07-04 - Personal or Private Interests - Nepotism

Hearing and decision by: Vice Chairs Barbara Green and Bernadette Winston; Commissioners Dennis Schrader, William Dailey and Wayne Stultz, Jr.

Dear Mr. Wagner:

Your office sought advice from the Public Integrity Commission (PIC) on allegations that Laurel School Board Vice President, Jerry White, was improperly involved in the hiring of his daughter as a nurse for Dunbar Elementary School. Based on the following law and facts, we find that the conduct is contrary to the State Code of Conduct.

I. Jurisdiction:

The State Code of Conduct applies to School Board members. 29 Del. C. § 5804(12)(a)(3).

II. Application of Law to Facts

Officials may not review or dispose of matters if a personal or private interest may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a). An automatic conflict exists if a close relative has a financial interest, in the decision. 29 Del. C. § 5805(a)(2)(a).

Officials may not use public office for unwarranted privileges, private advantage or gain. 29 Del. C. § 5806(e).

Your former investigator¹, Jean Rothenberger, interviewed Ms. Jennifer Givens, then-Principal at Dunbar, and School District Superintendent, Keith Duda, on hiring a nurse for Dunbar. Based on oral statements, and Ms. Given's written statement, when Mr. White's daughter, Jennifer White Davis, was not selected, he contacted them. (*Ms. Given's Statement, Tab A*). Ms. Givens says Mr. White said he was disappointed with the candidate selected; Laurel candidates should have preferential consideration; and his daughter's family needed insurance.

¹Now an investigator for the Attorney General's office.

Mr. Rothenberger said he interviewed Mr. Duda several times, and he confirmed Ms. Givens' statement. After Mr. Duda spoke with Mr. White, Mr. Duda told her they would rescind the offer to the original selectee. Mr. White's daughter would be recommended to the Board. Facts confirming her hiring: she is in the State's e-mail system, listed as working for the School District and on Dunbar's web site as a nurse.

Mr. Rothenberger said Ms. Givens was willing to testify, if necessary.

An automatic conflict arises if a "personal or private interest" may tend to impair judgment in performing official duties, if a "close relative" benefits to a greater extent than others similarly situated. 29 Del. C. § 5805(a)(2)(a). "Close relative" includes children. 29 Del. C. § 5804(1). This is to insure no preferential treatment or misuse of office.

Delaware cases: (1) A State employee discussed a contract with the selection Committee. He was not on the Committee; his participation was "indirect" and "insubstantial;" no facts suggested "undue influence," but his conduct was "undoubtedly improper" because his spouse's employer bid on the contract. Prison Health Services, Inc. v. State, Del. Ch., C.A. No. 13,010, Hartnett III, V.C. (July 2, 1993) (Tab B).

(2) In a hiring case, an uncle participated when his nephew was a candidate. The Court said his acts were "the most blatant discrimination based on nepotism and favoritism." Brice v. State, 704 A.2d 1176 (Del., 1998). The Court upheld the Merit Board's finding of an unfair labor practice. The penalty was that the agency had to pay attorney fees incurred by the non-selectee. Here, the non-selectee does not wish to challenge the decision. However, the case illustrates the problems for the participant and the State agency.

(3) In a land use decision, allegedly several officials had conflicts because close relatives, with no financial interest in the decision, had a personal interest in the zoning request. Harvey v. Zoning Board of Adj. of Odessa, Del. Super., C.A. No. 00A-04-007 CG, Goldstein, J. (November 27, 2000) (Tab B). The Court said even without financial interests by relatives, it would be "prudent" for the officials to recuse.

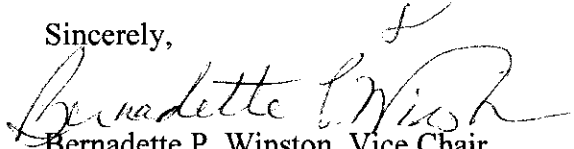
The law and cases bar participating when close relatives are affected, even without financial interests. His daughter has at least two monetary interests-- her pay, and an insurance interest, which has a monetary value. As to those benefits, she clearly benefited more as a result of her father's use of public office, than the selectee who had her offer rescinded. In fact, Delaware cases found improper conduct without even looking at the "greater benefit" words. Harvey, *supra*, Prison Health Services Inc. v. State, C.A. No. 13,010, Ch. Ct., V.C. Hartnett III (June 29, 1993); Beebe Medical Center v. Certificate of Need Appeals Board, C.A. No. 94A-01-004, Terry, J. (Del. Super., June 30, 1995), *aff'd*, Del. Supr., No. 304 (January 29, 1996) (Tab 2).

When the Commission finds a violation, it can impose an administrative penalty. For elected officials, like this School Board member, the only penalty we can impose is a reprimand or censure. 29 Del. C. § 5810(h). Those become public records. Through this opinion, we censure the conduct.

However, if a Commission majority finds reason to believe a violation of any criminal law occurred, it can refer it to the Attorney General to investigate and prosecute at his discretion. In this case, a majority so found. The criminal law we point to is the criminal restriction on

reviewing or disposing of matters if there is a personal or private interest. It carries a penalty of up to \$10,000 fine and/or up to one year in prison. 29 Del. C. § 5805(f). We do not know if the conduct violates the misconduct in office criminal law. 11 Del. C. § 1211; See, e.g., Howell v. State, 421 A.2d 892 (1980). A school official was prosecuted for misconduct in office. He argued his conduct may be unethical, but not criminal. The Court disagreed—finding the conduct fit both. Again, it is the Attorney General's discretion to investigate and prosecute Title 11 violations.

Sincerely,



Bernadette P. Winston, Vice Chair
Public Integrity Commission

Cc: Jean Rothenberger, State Investigator
Joseph R. Biden III, Attorney General